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Nos. 00-1751, 00-1777, 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

BRIEF OF STATE PETITIONERS

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QUESTION PRESENTED

Ohio's experimental school choice program provides tax-funded scholarships to low-income children who live in the Cleveland City School District. Parents of children in kindergarten through eighth grade may use the scholarships to pay tuition for those children at the private schools of their choosing, including religious schools. In light of Ohio's program, the question presented is as follows:

Whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not.

PARTIES TO THE PROCEEDING

The State Petitioners are Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the State of Ohio, the State of Ohio, and Saundra Berry, in her official capacity as the Director of the Cleveland Scholarship and Tutoring Program.

Respondents are Doris Simmons-Harris, Marla Franklin, Rev. Steven Behr, Sue Gatton, Mary Murphy, Rev. Michael DeBose, Cheryl DeBose, Glenn Altschuld, and Deidra Peterson.

Intervening defendants in the proceedings below are Senel Taylor, in his own behalf and as natural guardian of his daughter, Saletta Taylor, Johnnietta McGrady, on her own behalf and as natural guardian of her children, Trinnietta McGrady and Atlas McGrady, Christine Suma, on her own behalf and as natural guardian of her children, Dominic Suma, Gloria Suma, Emeric Suma, and Emily Suma, Arkela Winston, on her own behalf and as natural guardian of her children, Tanashia Winston and Devonte Winston, Amy Hudock, on her own behalf and as natural guardian of her child, Amber Lee Angelo, Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Delories Jones.

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JURISDICTION

The Court of Appeals entered judgment on December 11, 2000. (State Pet. App. at 1a-58a.) The Court of Appeals denied a petition for rehearing on February 28, 2001. (State Pet. App. at 166a.) The jurisdiction of this Court is proper under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The relevant provisions of state law, Ohio Revised Code Chapters 3313 and 3314, are reprinted in the Joint Appendix ("J.A.") at 21a-53a.

STATEMENT OF THE CASE

I. The Education Crisis In Cleveland.

In the summer of 1995, Ohio's General Assembly passed and then-Governor George Voinovich signed into law the Pilot Project Scholarship Program to address a deepening educational crisis within the Cleveland City School District. By almost any measure—test scores, graduation rates, student discipline, judicial intervention, and financial stability—objective assessments of the Cleveland schools' performance led to the same conclusion: a child's prospect for receiving a decent education from Cleveland's public schools was dismal.

This bipartisan measure was adopted in the wake of an unprecedented step by the United States District Court for the Northern District of Ohio. Earlier in 1995, that court in overseeing the longstanding Cleveland desegregation case ordered the State Superintendent to assume operational and managerial control of the district. *Reed v. Rhodes*, No. 1:73CV1300, 1995 U.S. Dist. Lexis 3814 (N.D. Ohio March 3, 1995). (Petitioners have lodged copies of this unreported decision with the Clerk.) In taking this extraordinary action, the federal district court cited the absence of fiscal, managerial, and operational controls, and the presence of a "financial crisis of magnitude." *Id.* at *6.

In March 1996, the State Auditor echoed the district court's concerns in a comprehensive audit of the Cleveland school district. Cleveland City School District Performance Audit (March 15, 1996), http://www.auditor.state.oh.us. The district, the State Auditor observed, was mired in a "financial crisis that is perhaps unprecedented in the history of American education." *Id.* at pp. 1-1, 2-1. The crisis had reached such proportions that it prevented the district from

providing even a minimally adequate education for its students. *Id.* At the time of the State Auditor's 1996 report, only nine percent of the district's high school students had passed all four sections of Ohio's ninth grade proficiency test. *See id.* at p. 2-3.

In these circumstances, many parents would have withdrawn their children from the public schools. In Cleveland, however, most families with school-age children were economically disadvantaged. *See* 1996 Audit at p. 1-4 ("72.5%" of the district's student body "are economically and academically disadvantaged . . ."). They had no practical choice but to accept what the Cleveland public schools offered them.

II. Creation Of The Pilot Scholarship Program.

Responding to this extraordinary situation, the General Assembly offered one immediate solution. On June 28, 1995, the legislature passed an experimental low-income scholarship law. *See* Ohio Revised Code ("R.C.") 3313.974-979. The Pilot Project Scholarship Program ("Program") provides two types of general relief for poverty-level families in the Cleveland school district: (i) it grants scholarship awards that may be used at the qualifying school of the parents' choice; and (ii) it provides to public school students money grants that may be used to pay for private tutoring. R.C. 3313.975.

A. The Scholarship Program.

The Program establishes a pilot project for *any* school district in the State that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." R.C. 3313.975(A).

Cleveland is currently the only Ohio school district falling within that category.

The Program provides scholarships to children residing in the Cleveland school district in grades kindergarten through eighth grade. R.C. 3313.975(C)(1). In determining which children are awarded scholarships, the Program requires the State Superintendent to establish eligibility criteria that "give preference to students from low income families," which the Program defines as families whose income is below 200 percent of the poverty line. R.C. 3313.978(A). In implementing this provision, the State Superintendent gives an absolute preference to children from low-income families: "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual at p. 1-11 (emphasis in original) (R. 96 at 759, Court of Appeals' Appendix ("C.A. App.") at 1358). When the number of qualified low-income applicants exceeds the scholarships available, the State Superintendent conducts a lottery to award scholarships among those applicants.

The scholarship amount likewise depends on family income. For low-income families, the State caps a participating school's tuition at $2,500 and pays 90 percent of whatever tuition the school actually charges. R.C. 3313.976(A)(8); 3313.978(A). For other families, the State pays 75 percent of a school's tuition, up to a maximum of $1,875 (75 percent of $2,500). *Id.*

The Program permits the participation of all private schools, whether religious or nonreligious, so long as they are located within the boundaries of the Cleveland school district and meet Ohio's statewide educational standards.

R.C. 3313.976(A)(1), (3). Eligibility to participate in no manner turns on whether a private school has a religious affiliation or includes religious teaching in its curriculum. Because the parents of scholarship recipients select among participating schools, the State exercises no control over the extent to which scholarships are used to attend religious rather than nonreligious private schools.

The State Superintendent provides information about the Program to *all* students in the Cleveland school district, and sets a deadline for submission of applications. R.C. 3313.978(A). After a student is selected to participate in the Program, his or her parent applies to a participating private school. R.C. 3313.978(A)(2)(a). The school then notifies the parent as to whether the child has been admitted. R.C. 3313.978(A)(2)(b). To ensure that scholarship recipients may choose which school to attend, the Program requires participating schools to admit students in accordance with rules and procedures established by the State Superintendent. If the number of applicants exceeds the available spaces in a particular school, the school must give priority to students enrolled during the preceding year, siblings of students enrolled during the preceding year, and students from low-income families. R.C. 3313.977(A)(1)(a)-(c). The participating school must fill any remaining spaces by lot. R.C. 3313.977(A)(1)(d).

The Scholarship Program also requires participating schools to be non-discriminatory in both their admissions policies and educational practices. Specifically, no participating school may "discriminate on the basis of race, religion, or ethnic background." R.C. 3313.976(A)(4). In addition, participating schools must "not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." R.C. 3313.976(A)(6).

Each scholarship is "payable to the parents of the student entitled to the scholarship," to be used at whichever participating school they have selected. R.C. 3313.979. The State mails these scholarship checks to the selected school, and the parents endorse them over to the school to meet their tuition obligations. *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000) (State Pet. App. at 4a).

The Program also permits public school districts adjacent to the pilot project district to participate in the Program and "receive scholarship payments on behalf of parents." R.C. 3313.976(C). As yet, no public school adjacent to Cleveland has chosen to participate in the Program. If adjacent public schools do participate, however, they will receive a tuition grant (up to $2,250) for each Program student accepted, *in addition to* the ordinary per-pupil state funding for that student. R.C. 3317.03(I)(1), 3317.022(A)(1).

The record shows that the Program, as implemented, is offering educational alternatives to the neediest Cleveland families. Affidavit of Kim Metcalf ("Metcalf Aff.") at ¶13 (J.A. at 71a). Scholarship recipients are predominately low-income minority children from families headed by a single mother. Affidavit of Joseph Viteritti ("Viteritti Aff.") at ¶12 (R. 95 at 715-16, C.A. App. at 1311-12). Indeed, 70 percent of the households of scholarship students are headed by a single mother, and the mean income of those families is $18,750. Metcalf Aff. at ¶7 (J.A. at 69a). These socioeconomic characteristics suggest that these children are more likely to suffer academic setbacks than the average student. *Id.*

Approximately 3,800 students enrolled in the Program during the 1999-2000 school year, Affidavit of

Saundra Berry ("Berry Aff.") at ¶5 (R. 96 at 1081, C.A. App. at 1678); more than 2,100 students were on the waiting list for entry. *Id.* at ¶12 (R. 96 at 1083, C.A. App. at 1680). Over 60 percent of the participating children came from families with income at or below the poverty line. *Id.* at ¶10 (R. 96 at 1082, C.A. App. at 1679).

For the 1999-2000 school year (on which the District Court record was based), parents chose from among 56 participating schools, 46 of which (82 percent) were religiously affiliated. *Simmons-Harris*, 234 F.3d at 949 (State Pet. App. at 5a). In that same year, 96 percent of all scholarship students attended one of these 46 religiously affiliated schools, which included Catholic, non-denominational Christian, Baptist, Lutheran, Seventh-Day Adventist, and Islamic schools. *Id.*; Declaration of Alice O'Brien at Exhibit E (J.A. at 281a-86a). The proportion of religious schools and students in the Program has varied significantly from year to year. At one point, 22 percent of Program students attended nonreligious schools. *Simmons-Harris*, 234 F.3d at 949 (State Pet. App. at 5a). The later decline in this percentage is explained in large measure by the 1997 enactment of legislation authorizing the creation of Cleveland's "community schools." As discussed below, *see infra* at 9, these schools offer another secular alternative in the State's comprehensive scheme to provide educational choice.

B. The Tutoring Program.

In addition to scholarships, the Program provides tutorial assistance grants for kindergarten through eighth grade students who choose to remain in the Cleveland public schools. R.C. 3313.978(B). Under these provisions, parents may arrange for registered tutors to provide assistance to their children and then submit bills for those services to the

Superintendent for payment. R.C. 3313.976(D), 3313.979(C). The Superintendent must offer as many tutorial assistance grants as she does scholarships. R.C. 3313.975(A). Students apply for the grants by the first day of the school year, and qualify for either 75 percent or 90 percent of the grant amount (up to $360), depending on family income. R.C. 3313.978(B), (C)(3). *See* Affidavit of Lytle Davis ("Davis Aff.") at ¶4 (J.A. at 166a).

During the 1998-99 school year, 1,391 students received tutoring assistance, which was offered at 41 sites throughout the Cleveland district. Davis Aff. at ¶¶6-7 (J.A. at 166a). Over 80 percent of tutoring-program families have incomes at or below the poverty level. *Id.* at ¶8 (J.A. at 166a).

III. The Framework Of Educational Options.

The Ohio Program operates among various educational options available to the parents of Cleveland's approximately 57,000 school children in the elementary grades, kindergarten through eight. In 1999, Cleveland had 82 public schools offering elementary education in those grades. http://www.cmsdnet.net/schools. Among those public schools, parents were able to choose from among 23 "magnet schools" providing a specialized approach or curriculum, focusing on, for example, arts, foreign language, computers, or science. Viteritti Aff. at ¶6 (R. 95 at 708, C.A. App. at 1304). Students must apply to attend magnet schools; however, a lottery determines assignments when the number of eligible applicants exceeds the number of available slots. *Id.* In 1999, Cleveland's 23 magnet elementary schools together enrolled 13,000 students. Affidavit of Jim Daubenmire at Exhibit 1 (J.A. at 151-52a); Viteritti Aff. at ¶6 (R. 95 at 708, C.A. App. at 1304). For each child enrolled in a magnet school during the 1997-98

school year, the district received $7,746, Viteritti Aff. at ¶7 (R. 95 at 709, C.A. App. at 1305), including state funding of $4,167. Affidavit of Catherine Hoxby ("Hoxby Aff.") at ¶4d (J.A. at 56a).

Among their educational options, parents also may select a "community school." A community school (called a "charter school" in other States) is an independently operated public school. Chartered separately, such schools are operated by their own independent governing boards, not by local school districts. Community schools enjoy academic independence to hire their own teachers and to determine their own curriculum. Affidavit of Steven M. Puckett ("Puckett Aff.") at ¶¶6-9 (J.A. at 159a-60a). As public schools, however, community schools can have no religious affiliation and are required to accept applicants based on a lottery. *Id.* at ¶¶3, 9 (J.A. at 158a, 160a). In 1999, Cleveland parents could choose among eight community elementary schools, which together enrolled approximately 1,600 students. Puckett Aff. at ¶12 (J.A. at 161a). For each child enrolled in a community school that year, the school received state funding of $4,518. *Id.* at ¶14 (J.A. at 163a).

The evidence before the District Court on the incentives facing low-income families thus identified two critical *dis*incentives to choosing participation in the tuition scholarship program: first, the State provides less per-pupil funding to scholarship schools; and, second, parents must pay a portion of scholarship schools' tuition. Hoxby Aff. at ¶¶4b-4d (J.A. at 57a). Community schools, in particular, serve as the direct competitors of private schools participating in the Scholarship Program. All else being equal, a community school enjoys a financial advantage because the State provides such schools at least twice the funding ($4,518 to community schools; no more than $2,250 as a tuition scholarship) as compared to scholarship schools.

Hoxby Aff. at ¶¶4a, 4c (J.A. at 57a). Parents, moreover, have a strong incentive to choose community schools inasmuch as they pay no tuition for their children. Puckett Aff. at ¶3 (J.A. at 158a). Notwithstanding this incentive structure, thousands of parents have chosen each year to participate in the Scholarship Program.

IV. Early Research Findings.

The Ohio General Assembly, in enacting the Program, required the State to contract with an independent research entity to assess and evaluate the Scholarship Program's operation and results. Ohio Am. Sub. H.B. 282, Section 4.34 (1999) (J.A. at 26a-27a). Accordingly, the Ohio Department of Education retained researchers at Indiana University to evaluate the Program, which took effect in the 1996-97 school year. The Indiana researchers found improved test scores in language and science for scholarship students, as compared with public school students. Metcalf Aff. at ¶17 (J.A. at 71a-72a). Paul E. Peterson of Harvard University conducted a similar study, concluding that scholarship students "did at least as well—and in some subject domains better than—the students in the public schools." Affidavit of Paul E. Peterson ("Peterson Aff.") at 34 (J.A. at 107a).

Both Metcalf and Peterson found that parents of scholarship students are significantly more satisfied with their children's schools than parents of public school students. In particular, they are more satisfied with teachers, academic standards, order and discipline, social activities, and other pupils at the school. Metcalf Aff. at ¶16 (J.A. at 71a); *see also* Peterson Aff. at 42-44 (J.A. at 115a-16a) (confirming evidence of parental satisfaction).

The studies also indicate that the factors leading parents to apply for the Program are overwhelmingly secular in nature. In the third year of the Program, 96.4 percent of the parents interviewed for the Indiana University study cited their belief that Program schools offered a better education as a "very important" or "somewhat important" reason for applying for a scholarship. Metcalf Aff. at ¶9 (J.A. at 69a-70a). Safety was a reason cited by 95 percent of the respondents. *Id.* Results from the Peterson study are to the same effect, with 85 percent of the parents citing academic quality and 79 percent citing safety as being "very important" considerations in choosing a Program school. Peterson Aff. at 28 (J.A. at 101a). In selecting a particular school, responding parents indicated that the religious affiliation of that school was the least important of five factors. Metcalf Aff. at ¶11 (J.A. at 71a); *see also* Peterson Aff. at 28 (J.A. at 101a).

V. The Litigation.

In January 1996, respondents mounted a multi-faceted challenge to the Scholarship Program in Ohio state court. The state trial court upheld the constitutionality of the Program, but the state court of appeals reversed. On appeal, the Ohio Supreme Court concluded that the Program did not violate the Establishment Clause, but held that the original enactment of the Program violated the "single subject" requirement imposed by the Ohio Constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). By a substantial bipartisan majority, the Ohio General Assembly reenacted the Program, and Governor Bob Taft signed it into law on June 29, 1999.

In July 1999, respondents launched a new challenge to the revised program, this time in federal district court. In

contrast to their earlier multi-pronged attack, respondents in this latter challenge relied solely on the Establishment Clause. Two groups of participating students and schools intervened in the Program's defense. On August 24, 1999, the District Court granted a preliminary injunction against the scholarship portion of the Program. *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 741-42 (N.D. Ohio 1999) (State Pet. App. at 164a-65a). Three days later, on the State's motion, the District Court stayed its preliminary injunction only insofar as it applied to scholarship students who had participated in the Program during the previous academic year. (State Pet. App. at 130a-32a). The State then sought relief from the Sixth Circuit to extend the stay of the preliminary injunction to encompass children new to the Program in 1999; however, the Court of Appeals did not rule on the motion. On November 5, 1999, this Court, by a five to four vote, granted the State's application for a full stay of the preliminary injunction. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999) (State Pet. App. at 127a).

The District Court issued its final opinion and order on December 20, 1999, granting summary judgment in favor of respondents and enjoining the distribution of scholarships under the Program. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999) (State Pet. App. at 126a). The District Court stayed its own injunction pending review by the Sixth Circuit. *Id.*

On December 11, 2000, a divided panel of the Sixth Circuit affirmed the District Court's permanent injunction. The panel majority held that the Program violates the Establishment Clause on the grounds that it has the primary effect of advancing religion and constitutes an endorsement of religion and "sectarian" education. *Simmons-Harris*, 234 F.3d at 961 (State Pet. App. at 1a-58a). The Sixth Circuit determined, first, that it could not consider other educational

options available to Cleveland parents, such as community schools. Since the Program is set forth in a separate chapter of the Ohio Revised Code and respondents had challenged only the Scholarship Program, the Court concluded that the other options available were "at best irrelevant." *Id.* at 958 (State Pet. App. at 23a-24a).

The panel majority further concluded that this Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), controlled. The Court of Appeals reasoned that in both *Nyquist* and the Cleveland Program, the majority of schools participating in the programs were religious. *Simmons-Harris*, 234 F.3d at 958 (State Pet. App. at 26a). Even though the Ohio Program is open to both religious and non-religious schools, the court below determined that, in fact, the Program was not neutral. Referring to "facts" not in the record, the panel majority found that the relatively low scholarship amount discourages non-religious schools from participating. *Id.* at 959 (State Pet. App. at 25a-26a). Since the majority of students receiving scholarships attend religious schools, the court found that parents had no "meaningful public school choice." *Id.* at 960 (State Pet. App. at 28a). Putting aside the feature of the Program that money flows to religious schools solely as a result of parental decisions, the Court of Appeals concluded that the Ohio Program directly funnels monetary subsidies to religious institutions. *Id.*

Similarly, the Sixth Circuit gave no weight to the fact that adjacent public school districts may choose to participate in the Program. The court's conclusion that these schools have a "financial disincentive" for participating was based on an erroneous assumption that such schools would receive a *total* of $2,250 for each Cleveland public school student they admitted. *Id.* at 959 (Pet. App. at 26a). In fact, any adjacent public school districts would receive $2,250 *in addition to*

their usual state funding, because scholarship students would be included in each suburban school district's total number of students (the "average daily membership," or "ADM") for purposes of calculating the amount of state funds the district receives. *See* R.C. 3317.03(I)(1), 3317.022(A)(1).

Judge Ryan dissented. In his view, the New York statute at issue in *Nyquist* was "totally different" from the Ohio statute in all essential respects. *Id.* at 963 (State Pet. App. at 34a) (Ryan, J., dissenting in part). The purpose of the New York statute, Judge Ryan noted, was to benefit financially pressed private *schools*, whereas the purpose of the Ohio Program was to assist poverty-level *students*. *Id.* at 964 (State Pet. App. at 37a-38a). Unlike the New York schools in *Nyquist*, the schools participating in Ohio's program do not receive direct financial grants and may not discriminate on the basis of religion. *Id.* at 965 (State Pet. App. at 38a). Quite apart from these factual distinctions, Judge Ryan concluded that this Court's post-*Nyquist* decisions had undermined *Nyquist*'s continuing vitality—at least as applied to a genuine private choice program such as Ohio's. *Id.* at 973 (State Pet. App. at 56a-57a).

On December 22, 2000, the State filed a petition for rehearing and suggestion for rehearing en banc. The Court of Appeals denied the petition on February 28, 2001. (State Pet. App. at 166a-67a.) On March 8, 2001, the court issued a stay of mandate pending the filing of any petitions for *certiorari*, which the State Petitioners timely filed on May 23, 2001. On September 25, 2001, this Court granted *certiorari* as to three separate petitions and consolidated the cases for argument.

SUMMARY OF ARGUMENT

The Ohio Scholarship and Tutoring Program readily passes constitutional muster under this Court's Establishment Clause jurisprudence. Tailored to meet the profound needs of Cleveland parents, the Program—which was twice passed by Ohio's General Assembly—is a neutral regime based on genuine parental choice among an array of educational options. Specifically, the Program distributes aid to Cleveland parents, who in turn redirect that aid to participating private schools through individual parental decisionmaking. As a true private choice program, the Ohio Program in no wise presents the heightened Establishment Clause dangers—in particular the danger of perceived governmental endorsement of religion—that this Court has discerned in direct-aid programs.

To the contrary, Ohio's program was crafted with careful attention to Establishment Clause requirements. In contrast to direct-aid programs, this Court's test for adjudicating challenges to government aid programs under which individual students are intended beneficiaries focuses on two pivotal considerations: first, the presence or absence of true private choice and, second, the neutrality of the program. Where a State offers individualized benefits through a neutral regime of private choice, this Court has uniformly upheld such programs against Establishment Clause assaults. That result should obtain here too, as the Ohio Supreme Court concluded in an earlier phase of the litigation and as Judge Ryan demonstrated in his vigorous dissent.

The record in this case establishes beyond cavil that Cleveland parents do indeed exercise true, independent choice. Most importantly, the Ohio Program creates no financial incentives to choose religious schooling. Instead,

Ohio provides for the same scholarship amounts regardless of whether a parent chooses education in religious or secular settings. Moreover, state funding of Program scholarships is, on a per-pupil basis, far less than state per-pupil expenditures for students attending Cleveland's public schools. Cleveland parents are therefore subject to no governmental inducements favoring religious education.

The Ohio Program also satisfies this Court's longstanding neutrality guidelines. Only one factor determines a family's initial Program eligibility: whether that family resides in a school district that is or has been under federal court order requiring state supervision or operational management. The Program's second criterion, personal income, is used specifically to steer aid toward children from Cleveland's neediest families and is also religiously neutral. This carefully calibrated neutrality is a far cry from situations where lawmakers engage in covert religious gerrymandering of program eligibility.

These elements of neutrality and private choice also satisfy the more recent test set forth in *Agostini v. Felton*, 521 U.S. 203 (1997), in the context of direct aid to religious schools. Respondents have never challenged the secular purpose of this program, nor have they alleged excessive entanglement between government and religious institutions. The sole questions under an *Agostini* analysis are therefore whether the Ohio law results in governmental indoctrination and whether it defines recipients by reference to religion.

The Ohio Program unequivocally satisfies both requirements. Because distribution of the Program's inherently secular scholarships rests entirely upon the true, uncoerced choices of Program parents, any indoctrination that occurs in religious schools is attributable to parental choice, not governmental action. In addition, the Program

defines beneficiaries without reference to religion. In particular, parental eligibility is in no way determined by religion, and no social coercion or financial incentives influence parents toward selection of religious, as opposed to secular, schooling. These same features also guarantee that the Program does not constitute governmental endorsement of religion.

In opposition to this double line of unambiguous authority, the Sixth Circuit advanced several reasons for invalidating the Program, including (i) its large proportion of religiously affiliated scholarship schools; (ii) a novel theory that *under*-funding religious activities can constitute unconstitutional *favoring* of religion; and (iii) this Court's decision in *Nyquist*. The first two rationales did not loom large in the panel majority's opinion and in any event are foreclosed by this Court's decisions. In particular, this Court's pronouncements in *Mueller v. Allen*, 463 U.S. 388 (1983), and other cases stand squarely against the non-*Nyquist* branches of the panel majority's analysis.

The Sixth Circuit majority relied in the end on *Nyquist* itself. But the majority failed to mention, much less consider, the critical distinction that *Nyquist*'s elaborately interrelated program provided assistance to at-risk private schools, whereas Ohio's program provides assistance solely to at-risk students. Nor did the Sixth Circuit heed *Nyquist*'s express reservation of judgment on cases, like this, posing constitutional challenges to generally available scholarship programs. This case, accordingly, does not necessarily require the Court to consider whether, given its unique facts, *Nyquist* remains good law. We are nonetheless constrained to observe that *Nyquist* continues to sow seeds of constitutional confusion, as illustrated by the panel majority's disruptive *Nyquist*-driven evisceration of Ohio's generally applicable scholarship program for Cleveland's

needy families. This is tragically misguided. *Nyquist* should not be permitted, at this late date in the development of Establishment Clause doctrine, to stand in the way of the Ohio Program.

ARGUMENT

In the mid-1990s, the Cleveland public schools were engulfed in a profound educational crisis, which led the federal district court in Cleveland to order oversight of the school district by Ohio's State Superintendent of Public Instruction. The Ohio Pilot Project Scholarship and Tutoring Program represents the considered response of the Ohio General Assembly—on two separate occasions and with the approval of two different governors—to that extraordinary mandate and the underlying problems plaguing Cleveland's schools. This comprehensive response has as its centerpiece the opening of additional educational alternatives for Cleveland parents, primarily low-income families with children not otherwise enrolled in private school.

In looking to expand parental options, the General Assembly fashioned a program that neutrally invites the participation of all qualifying private schools within the Cleveland school district. No distinctions were drawn between religiously affiliated schools and schools lacking such affiliations. Instead, Ohio's lawmakers were inclusive in their approach, taking the city's private educational institutions as they found them and excluding no qualifying institution that might provide opportunity for Cleveland schoolchildren. The Program, in short, is one that maximizes the range of parental choice through equal access to *all* private schools.

The response from the Cleveland community has been overwhelmingly positive. The Program has attracted thousands of inner city parents, predominantly poor, who are deeply concerned about the educational quality and safety of the institutions to which their children are entrusted each school day. This support for the Program within the inner city, broad as well as deep, is reflected in the waiting lists of parents seeking to obtain scholarships for their children. The early educational returns are also promising. Researchers are in the process of confirming what Cleveland parents already know—that private schools are indeed helping to ameliorate the profoundly disturbing conditions that had afflicted Cleveland's schools.

Although the Sixth Circuit held that Ohio's program must fall to the sword of the Establishment Clause, that view is misguided. At every turn, the Ohio General Assembly—and Governors Voinovich and Taft—consciously crafted a program respectfully attentive to this Court's Establishment Clause jurisprudence. In fact, Ohio's representatives and governors relied on expectations that this Court would stay its steady jurisprudential course in shaping what they consider an effective and constitutional program.

The Sixth Circuit implicitly recognized as much, for in invalidating Ohio's neutral regime of private choice the panel majority, over a spirited dissent by Judge Ryan, reached far back in time to a decision from the early years of the Burger Court. Specifically, the court invalidated the considered judgment of Ohio's political branches based on a single decision from a generation ago in *Nyquist*—a precedent that, upon analysis, by no means forecloses the full range of educational opportunities for Cleveland's schoolchildren. This case is not *Nyquist*-redux. To the contrary, Ohio's program stands comfortably in the mainstream of this Court's body of precedent upholding

benefits programs in the face of Establishment Clause challenges. It is to that precedent, and the principles underlying it, that we now turn.

I. Ohio's Program Passes Constitutional Muster Because It Is Religiously Neutral And Affords True Private Choice To Cleveland Parents.

In recent years, the Court has clarified the constitutional standards that test whether government aid programs violate the Establishment Clause. While the Court once employed the three-pronged test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), it has now set forth—in addition to *Lemon*'s traditional "purpose" prong—a more precise three-pronged "effects" analysis that considers whether the aid results in governmental indoctrination; defines recipients by religion; and creates excessive entanglement. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion); *id.* at 845 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 234.

This Court's recent clarifications of the *Lemon* test have come in cases distinct from (and in some respects more difficult than) the one presented here. The programs at issue in the Court's most recent decisions, principally *Mitchell* and *Agostini*, distributed aid directly to religiously affiliated schools. *See Mitchell*, 530 U.S. at 829 (plurality opinion) (citations omitted); *Agostini*, 521 U.S. at 209-10. While far from being *per se* invalid, such direct aid poses unique Establishment Clause concerns. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995); *id.* at 846-47 (O'Connor, J., concurring); *Bowen v. Kendrick*, 487 U.S. 589, 608-09 (1988).

As Justice O'Connor, joined by Justice Breyer, recently observed: "In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools." *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring). In programs of direct aid, if a religious school employs that aid to inculcate religious doctrine or teaching, it might be argued that the government has communicated a subtle message of endorsement. *Id.* Such messages of official endorsement, as various Justices have indicated, are potentially problematic under the Establishment Clause. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). By contrast, when government aid supports a school's religious mission only as a result of independent decisions by numerous individuals to guide *their* aid to that school, "no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment); *accord Rosenberger*, 515 U.S. at 849 (O'Connor, J., concurring).

Ohio's program is not one of the variety that offers direct aid to private schools. Rather, the Program, as fashioned by Ohio legislators and governors, distributes aid to *parents*, who in turn redirect that aid to participating schools through entirely uncoerced individual decisions: (i) choosing to participate in the Scholarship Program in the first instance; and then (ii) selecting which school will receive the

tuition payment. The Program accordingly does not pose the particular dangers of governmental endorsement of religion that this Court has discerned in direct-aid programs.

A. Ohio's Program Satisfies This Court's Longstanding Test Applied In Individual Benefits Cases.

To consider the validity of a true private choice program like Ohio's, we return to the roots of this Court's modern Establishment Clause jurisprudence. Since the initial incorporation of the Establishment Clause through the Fourteenth Amendment, in each and every instance in which individual students were the intended, direct beneficiaries of a government aid program (*Everson*, *Mueller*, *Witters*, and *Zobrest*), this Court has focused attention on two overriding considerations: first, the presence or absence of true private choice and, second, whether the program "neutrally provides state assistance to a broad spectrum of citizens." *Mueller*, 463 U.S. at 398-99. Where, as here, a neutral regime of true private choice is found, the Court has uniformly upheld challenged aid programs under the Establishment Clause.

1. Private Choice. The first prong of this Court's longstanding Establishment Clause test for individual aid programs asks whether the State permits true private choice. For example, *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), upheld reimbursements to parents who paid for their children's bus transportation to public or private schools, including parochial schools. While recognizing that some children might not attend parochial school without the reimbursements, the Court nevertheless found that the "legislation, as applied, does no more than provide a general program to help parents get their children, *regardless of their religion*, safely and expeditiously to and from accredited schools." *Id.* at 18 (emphasis added).

Mueller v. Allen similarly upheld a program of tax deductions for educational expenditures, even though the overwhelming majority of those deductions (96 percent) went to parents whose children attended religious schools. *Mueller*, 463 U.S. at 401. The Court approved the program because, among other reasons, the law "channel[ed] whatever assistance it may provide to parochial schools *through individual parents*." *Id.* at 399 (emphasis added). Because the public money became available to religiously affiliated schools "only as a result of numerous private choices of individual parents of school-age children," it differed from earlier decisions of the Court involving "the direct transmission of assistance from the State to the schools themselves." *Id.*

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court reaffirmed the importance of individual choice. In permitting a blind student to spend public educational grant money at a religious seminary, the *Witters* Court held that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487. Under *Witters*, when individuals—rather than government—determine whether and how much money flows to religious institutions, it is no more constitutionally troubling than when a government employee donates his or her paycheck (all derived from public funds) to a church. *Id.* at 486-87. Similarly, *Zobrest* upheld a challenged program of government-paid sign-language interpreters that "dispens[ed] aid not to schools," as the Court stressed, "but to individual" hearing-impaired children. *Zobrest*, 509 U.S. at 13. Again, the program's hallmark trait of private choice proved critical: "By according parents

freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

The Ohio Program forthrightly meets these requirements. By its terms, the Program dispenses aid to schools only as a result of the individual choices by Cleveland parents. Before the district court, the State submitted abundant evidence confirming that the percentage of religious schools participating in the Scholarship Program does not restrict private choice, but reflects it. Specifically, the State furnished affidavits of parents who testified, without contradiction, about the unconstrained choices they had made and why they made them. *See, e.g.*, Affidavit of Leigh-Anne Ford (J.A. 168a-70a); Affidavit of Dayna Hunter (R. 96 at 1050, C.A. App. at 1648). What is more, the State provided expert reports demonstrating that, in evaluating which school to select, Program parents consider various factors, the least important of which is the school's religious affiliation. *See* Peterson Aff. at 28-29 (J.A. at 100a-01a) (religion ranked fourth among reasons, behind academic quality, safety, and location); Metcalf Aff. at ¶¶10-11 (J.A. at 70a-71a) (religion was less important than school reputation, availability of space, school location, and recommendations of other people).[1]

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[1] These reports systematically analyzed the overwhelming satisfaction of parents who chose to participate in the Scholarship Program. Parents of scholarship students are significantly more satisfied with their children's schools than are parents of either public school students, or students who applied for, but did not receive scholarships. In addition, Scholarship Program parents are more satisfied with the academic quality of the schools, the teachers, safety, school

So too, not a shred of record evidence suggests that *any* Cleveland parent has ever wanted a non-religious Scholarship Program school but failed to find it. As Judge Ryan emphasized in dissent, "there is no evidence that any of the several nonreligious, private schools participating in the program have ever rejected a single voucher applicant for any reason," nor is there any evidence "that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." *Simmons-Harris*, 234 F.3d at 971 (Ryan, J., dissenting in part) (State Pet. App. at 51a-52a).

This impressive body of uncontradicted evidence is constitutionally dispositive under this Court's teachings because it is *adult parents* who are making these independent choices. This is not a case where the Court must concern itself with distinctions among elementary, secondary, and college students, or deal with the sensitive issue of safeguarding individual conscience from social pressures for religious conformity. *Cf. Mitchell*, 530 U.S. at 904-06, (Souter, J., dissenting); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). To the contrary, as the Court "consider[s] whether the community would feel coercive pressure" to engage in religious activities, "the relevant community would be the parents, not the elementary school children." *Good News Club v. Milford Cent. Sch.*, 121 S.Ct. 2093, 2104 (2001); *compare Lee*, 505 U.S. at 592-93. Because Cleveland children "cannot attend without their parents' permission," those children "cannot be coerced into engaging

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discipline, and the level of parental involvement. Metcalf Aff. at ¶16 (J.A. at 71a); Peterson Aff. at 43 (J.A. at 116a).

in . . . religious activities." *Good News Club*, 121 S.Ct. at 2104. The Ohio Program thus provides for *private* and *parental* decisionmaking, ensuring that decisions as to whether to participate in the Program are uninfected by social coercion. Indeed, parents' decisions with regard to Scholarship Program participation are legally indistinguishable from their use of federal scholarships at religiously affiliated colleges under the G.I. Bill and similar adult educational programs.

Nor does the record suggest that Cleveland parents might be influenced by state-created financial incentives favoring religious as opposed to secular education. This requirement for a lack of coercive financial incentives, evident in *Witters* and *Zobrest* and confirmed by *Agostini* and *Mitchell*, is fundamental to the protection of genuine private choice. "For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly 'independent.'" *Mitchell*, 530 U.S. at 813 (plurality opinion) (quoting *Witters*, 474 U.S. at 487, and citing *Agostini*, 521 U.S. at 232 (holding that Title I did not create any impermissible incentive, because its services were "available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school")); *see also Zobrest*, 509 U.S. at . 10 (discussing, in successive sentences, neutrality, private choice, and financial incentives, respectively).

The Sixth Circuit nonetheless found these elements of facial neutrality insufficient. *Simmons-Harris*, 234 F.3d at 959 (State Pet. App. at 25a). The court concluded that, since a large majority of participating schools are religious and a large majority of participating students are enrolled at religious schools, "the program clearly has the impermissible effect of promoting sectarian schools." *Id.* at 959 (State Pet. App. at 25a-27a). This is profoundly misguided. The

relevant question, according to *Mueller*, *Witters*, and *Zobrest*, is not what schools participate in the program from year to year; rather, it is whether all parents with eligible children and all private and public schools—secular or religiously affiliated—may exercise *uncoerced private choice* in determining whether to participate. If, as here, the State establishes a regime of uncoerced individual choice, and provides all neighboring public and private schools—both secular and sectarian—a right of equal participation, it need do no more.

Moreover, looking beyond the immediate Scholarship Program to the larger context of public support for education in general, the State provided uncontradicted evidence not only of a lack of financial incentives to choose religious schooling, but of affirmative incentives to select *non-religious* schooling. While students may attend public school free of charge, parents of Scholarship Program students—including those from low-income families—must pay at least ten percent of the cost of a child's education. Moreover, the State provides significantly less funding to Scholarship Program schools than to the other educational options available to the largely low-income Scholarship Program parents. For example, the State spends almost twice as much for each student attending a community school—which must by law eschew religious affiliation—as compared to a Program school. Hoxby Aff. at ¶¶4a, 4c (J.A. at 56a). Similarly, magnet schools, which are public and therefore necessarily secular, receive government aid equal to an average of about three times the amount of Program scholarships. Hoxby Aff. at ¶¶4a, 4d (J.A. at 56a). The combined effect of the required Program co-payment and the larger pattern of state educational spending in Cleveland is that "the State has not created a spending incentive for Cleveland parents to choose a religious private school rather than a non-religious community school." Hoxby Aff. at ¶¶4f,

4g (J.A. at 58a); *see also* Viteritti Aff. at ¶7 (R. 95 at 708, C.A. App. at 1304).[2]

With the Scholarship Program itself lacking any financial incentives to select religious education and broader state policies affirmatively favoring non-religious education, the Court of Appeals should have concluded that the Scholarship Program does not "creat[e] a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. As this Court instructed in both *Mueller* and *Witters*, there ordinarily can be no "primary effect of aiding religion" where, as here, an individualized educational assistance program imposes no social coercion and "creates no financial incentive for parents to undertake the sectarian education." *Witters*, 474 U.S. at 488. Under this Court's precedents, the Ohio Program is a regime of true private choice.

2. Religiously Neutral Criteria. In addition to the critical element of genuine private choice, this Court's longstanding test probes whether an aid program "neutrally provides state assistance to a broad spectrum of citizens." *Mueller*, 463 U.S. at 398-99. In its earliest modern-day interpretation of the Establishment Clause, this Court held in *Everson* that the Constitution does not preclude a State from extending the benefit of its laws to all citizens without regard

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[2] Indeed, the Scholarship Program co-payments and higher per-pupil payments to community and magnet schools (as compared to Program scholarships) are undoubtedly important reasons why non-religious schools often seek to participate in the Community School Program, not the Scholarship Program, *see* Hoxby Aff. at ¶5b (J.A. at 59a), and why parents who take their children out of neighborhood public schools, but decline religious educational options, overwhelmingly choose community and magnet schools. *Id.* at ¶¶ 4i, 4j (J.A. at 59a).

to religious affiliation. To the contrary, the "First Amendment *requires* the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson*, 330 U.S. at 17 (emphasis added).

Likewise, in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 243 (1968), the Court placed critical reliance on the neutral availability of the public benefit there at issue: "The law merely makes available to *all* children the benefits of a general program to lend school books free of charge." In similar vein, *Witters* upheld a private choice program even in the most profoundly religious educational context—training for clerical ordination—by virtue of the fact that the program's benefits were "'made available generally without regard to the sectarian-non-sectarian, or public-nonpublic nature of the institution benefited.'" *Witters*, *474* U.S. at 487 (quoting *Nyquist*, 473 U.S. at 782-83 n.38); *see also Zobrest*, 509 U.S. at 10.

The Ohio Scholarship Program readily satisfies this bedrock criterion of neutrality. Only one factor determines a family's initial Program eligibility: whether that family resides in a school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." R.C. 3313.975(A). This requirement of judicial intervention clearly rebuts any claim that the facially neutral selection of the Cleveland geographic area somehow masks a covert religious classification. While Cleveland is currently the only Ohio school district to be under such a federal court order, that unfortunate distinction is in no way connected to the religious character of the majority of its private schools. Rather, under the statute as neutrally drawn, additional Ohio school districts, including those with different religious

demographics, could be added to the Scholarship Program in the future. *See Simmons-Harris v. Goff*, 711 N.E.2d at 213-14.

This point is fundamental because Cleveland's long-standing preponderance of religiously affiliated private schools serving urban students did not arise as the result of any government action, much less the Scholarship Program. This is not a case where legislators have configured a program, "with purpose and precision, along a religious line," in order to effect the type of "explicit religious gerrymandering" that violates the Establishment Clause. *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 729 (1994) (Kennedy, J., concurring). It would therefore be incongruous—and problematic under the Establishment Clause—to invalidate a Cleveland scholarship program while permitting an identical program in another community, with equally troubled schools, where secular private schools command a larger share of the educational market. Because "[t]he Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools," the "proper" principle for Establishment Clause jurisprudence is "government impartiality, not animosity, toward religion." *Id.* at 717-18 (O'Connor, J., concurring).

Beyond the requirement of a federal court order, the other Program eligibility criterion is likewise religiously neutral: personal income. Specifically, the Program channels benefits toward children from low-income families through a regime of preference both in the application process, R.C. 3313.978(A), and in the form of larger scholarship awards once children are admitted into the Program. R.C. 3313.976(A)(8); 3313.978(A). The evidence confirms that the Program is, in fact, serving these intended beneficiaries, as 60 percent of the participating students in the 1999-2000

school year were from families with incomes at or below the poverty line. Berry Aff. ¶10 (R. 96 at 1082, C.A. App. at 1679). Such preferential distribution of benefits to citizens having the greatest need poses no Establishment Clause concerns. *Mitchell*, 530 U.S. at 830 (plurality opinion) ("[W]e would not presume that such a deviation [in favor of poor families] created any incentive one way or the other with regard to religion.").

Finally, the Program confirms its studied neutrality by expressly requiring that no participating school "discriminate on the basis of race, religion, or ethnic background." R.C. 3313.976(A)(4). This non-discrimination requirement ensures that no child is denied equal access to the education offered by a particular participating school based on his or her religious beliefs. Both the Scholarship Program itself and the opportunity to take advantage of it through admission to participating schools are thus open on equal terms to a class of children defined as being at greater educational risk *solely* by federal court order and family income. The Program's eligibility rules can in no way be taken to define either express or implied religious classifications.

To be sure, in order to further guard against state coercion of religious participation, this Court has often demanded that public benefits themselves meet a final requirement: that of "neutrality" in the sense of not being inherently religious. The seminal *Everson* decision thus upheld the provision of bus transportation to all school children, including those attending religiously affiliated schools, only after placing such transportation in the category of "general government services." *Everson*, 330 U.S. at 17. *Everson* analogizes student transportation to such other long-settled practices as governmental provision of crossing guards, police and fire protection, and the like. *Id.* at 17-18.

Everson's requirement that the benefits themselves not be inherently religious was further elaborated in *Allen*, upholding the provision of secular textbooks: "Bus rides have no inherent religious significance . . . . [Similarly,] we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content." *Allen*, 392 U.S. at 244. Justice Douglas put an even finer point on the issue in his *Allen* dissent: "Whatever may be said of *Everson*, there is nothing ideological about a bus. There is nothing ideological about a school lunch, or a public nurse, *or a scholarship*." *Allen*, 392 U.S. at 257 (Douglas, J., dissenting) (emphasis supplied); *see also Mitchell*, 530 U.S. at 890 (Souter, J., dissenting) (citing *Agostini*, 521 U.S. at 232 (discussing need to assess whether aid was "neutral and nonideological"); *Zobrest*, 509 U.S. at 10 (describing translator as "neutral service"); *Tilton*, 403 U.S. at 688 (characterizing buildings as "religiously neutral")).

Here, the Scholarship Program offers benefits that are in themselves not inherently religious. As monetary aid, these benefits, like buses and buildings, are free of content and, therefore, the nature of this benefit itself presents no inherent risk of covert promotion of religion. *See Mitchell*, 530 U.S. at 824 (plurality opinion) (financial aid lacks content and therefore minimizes risk that religious indoctrination will be attributed to the government); *id.* at 841 (O'Connor, J., concurring) (monetary payments acceptable in neutral program based on private choice); *Mueller*, 463 U.S. at 400 (tax deduction not religious in nature). Indeed, as we have seen, *Witters* upholds precisely this sort of tuition grant in the profoundly religious context of training for the ordained ministry. *Witters*, 474 U.S. at 489. Because Scholarship Program grants are usable at *any* institution meeting secular educational criteria, *see* R.C.

3313.976(A)(3), such benefits are in themselves no more ideological than bus rides, secular textbooks, or school lunches. Where, as here, they are exercised through private choice and distributed according to neutral criteria, they satisfy the demands of the Establishment Clause.

B. Ohio's Program Satisfies This Court's *Agostini* Test Used In Direct-Aid Cases.

The same elements of the Ohio Program that satisfy the criteria articulated in the Court's longstanding line of authority in cases of individualized benefits likewise satisfy *Agostini*'s more recent test set forth in the context of *direct aid*. When considering the validity of direct-aid programs, this Court continues to ask "whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini*, 521 U.S. at 222-23. Here, respondents long ago conceded that Ohio acted to achieve secular purposes—improving educational opportunities for low-income Cleveland students. *Simmons-Harris*, 72 F. Supp. 2d at 845, n.6 (State Pet. App. at 82a); *accord Simmons-Harris*, 234 F.3d at 967 (State Pet. App. at 44a) (Ryan, J., dissenting in part) ("The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape.") (emphasis in original). These concededly secular purposes are only reconfirmed by the extraordinary judicial mandate that prompted Ohio's elected representatives and governors to fashion the Program.

What has changed in recent years is this Court's articulation of "the criteria used to assess whether aid to religion has an impermissible *effect*." *Agostini*, 521 U.S. at 223 (emphasis added). The Court recently has set forth three

primary criteria to test whether government aid programs impermissibly advance religion: (i) whether the aid results in governmental indoctrination, (ii) whether the aid program defines its recipients by reference to religion, and (iii) whether the aid creates an excessive entanglement between government and religion. *Mitchell*, 530 U.S. at 808 (plurality opinion); *id.* at 845 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 234. Since respondents have not suggested that the Ohio Program creates an excessive entanglement, only two *Agostini* criteria—indoctrination and reference to religion—are germane to this case. Assessed against those criteria, the Ohio Scholarship Program plainly passes muster.

1. Governmental Indoctrination. The question whether governmental aid to religious schools results in governmental indoctrination is "ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (plurality opinion); *accord Agostini*, 521 U.S. at 230 (question is whether "any use of [governmental] aid to indoctrinate religion could be attributed to the State"); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence.").

To answer this question, and to distinguish between indoctrination attributable to the State and that attributable to private citizens, the Court has "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality opinion); *id.* at 838 (O'Connor, J., concurring) ("we have emphasized a program's neutrality repeatedly in our decisions approving

various forms of school aid"); *id.* at 878 (Souter, J., dissenting) (acknowledging that the Court has addressed the presence or absence of neutrality "in some sense" "from the moment of *Everson* itself").

In addition to neutrality, the Court has also "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* at 810 (plurality opinion) (quoting *Agostini*, 521 U.S. at 226). The Court has found important whether the "private choices of individual parents," as opposed to the "unmediated" will of government, *School District of Grand Rapids v. Ball*, 473 U.S. 373, 395 n.13 (1985) (internal quotation marks omitted) (overruled in part on other grounds), determine what schools ultimately benefit from the aid, and how much. *Mitchell*, 530 U.S. at 810 (plurality opinion). "For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Id.*

As we have already seen, the Ohio Scholarship Program plainly satisfies these requirements. Distribution of the Program's scholarships is based on religiously neutral criteria and depends entirely upon the private, uncoerced choices of Program parents. For that reason, any indoctrination that occurs in religiously affiliated schools participating in the Program is attributable only to individual parental choice, not governmental action. Such a "carefully constrained program" can in no way "be viewed as an endorsement of religion," *Agostini*, 521 U.S. at 235 (citation omitted), for "[t]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for

[a] religious education" does not "confer any message of state endorsement." *Witters*, 474 U.S. at 488-89.

2. Reference to Religion. The second *Agostini* criterion looks to a closely related set of facts, and asks a familiar but slightly different question—whether the criteria for allocating the aid in question "create a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. *Agostini* itself sets out the rule for resolving this issue: "This incentive is not present" where aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* In addition, "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does *not* mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini*'s second criterion, an 'incentive' for parents to choose such an education for their children." *Mitchell*, 530 U.S. at 814 (plurality opinion) (citing *Allen*, 392 U.S. at 244) (emphasis added). After all, "*any* aid will have some such effect." *Id.* (emphasis in original).

Viewing the Program against these principles, whether in isolation or within the comprehensive range of educational options available in Cleveland, ineluctably demonstrates that the State has not defined its recipients in religious terms, either explicitly or through impermissible financial incentives. Significantly, within the Scholarship Program itself, eligible recipients are in no way defined in religious terms, but instead are defined only as parents of students residing in a school district that has been under a federal court order and (potentially) as having low-income status. R.C. 3313.975(A). Nor, as demonstrated above, *supra* at 25-27, is there any social coercion or financial incentive for parents to select a religious, as opposed to

secular schooling. Once again, "this carefully constrained program also cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U.S. at 235 (citing *Witters*, 474 U.S. at 488-89). *Agostini*'s more recently framed direct-aid test, like *Mueller*'s longstanding individualized-benefits test, demonstrates that the Program readily passes muster.

II. The Sixth Circuit's Asserted Justifications For Invalidating The Program Do Not Withstand Scrutiny.

In the face of unambiguous authority to the contrary, the Sixth Circuit struck down the Program based primarily on (i) the large proportion of religiously affiliated scholarship schools; (ii) the novel theory that *under*-funding religious activities can somehow constitute unconstitutional *favoring* of religion; and (iii) this Court's decision in *Nyquist*. As demonstrated below, none of these arguments finds support in this Court's decisions.

A. Cleveland Parents Do Not Lack "Real Choice" Merely Because A Large Majority Of Scholarship Schools Are Religious.

Respondents challenged the Program below on grounds that the number of non-religious Program schools is inadequate to provide "real choice." The Sixth Circuit agreed, deeming it highly significant that "the great majority of schools benefited by these tuition dollars are sectarian." *Simmons-Harris*, 234 F.3d at 958 (State Pet. App. at 25a). This Court's body of precedent offers no support for this odd analysis.

As a matter of law, the Establishment Clause precludes giving *any* significance, much less dispositive weight, to tabulations of the aggregated results of thousands

of truly independent parental decisions. As *Mueller* explained, "Where, as here, aid to parochial school is available only as a result of decisions of individual parents[,] no imprimatur of State approval can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (internal quotation omitted).

Mueller thus held that even where an overwhelming majority (96 percent) of individual tax benefits go to parents of children in religious schools, this fact, without more, does nothing to call into question whether parents have exercised "real choice." *Id.* at 401. Putting any lingering doubt to rest, Justice Powell observed in *Witters* that *Mueller* had settled the constitutionality of otherwise valid educational assistance programs in such circumstances. "*Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate [the Establishment Clause] because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91 (footnote omitted) (Powell, J., concurring) (citing *Mueller*, 463 U.S. at 398-99). Similarly, Justice O'Connor's separate opinion in *Witters* expressly embraced this view. *Id.* at 493 (O'Connor, J., concurring).

Mueller therefore controls in holding that the dual feature of *ex ante* neutrality and private choice is what legally matters, not the tally of *ex post* results aggregated over thousands of independent parental decisions:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach

> would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Mueller, 463 U.S. at 401.

As if more were needed, *Agostini* involved a challenged program under which more than 90 percent of participating private schools were religious. *Agostini*, 521 U.S. at 210. Even so, *Agostini* succinctly states: "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who receive the otherwise neutral aid." *Id.* at 229. Aid programs are therefore not subject to invalidation based on numbers of recipients who choose to employ aid in parochial settings.

B. Ohio's Program Does Not Lack Religious Neutrality Because Of The Amount Of Its Scholarships.

The Sixth Circuit concluded that the mere dollar amount of a scholarship can transform what had been a secular benefit into a "sectarian" one. Here, the Sixth Circuit cited no precedent whatsoever; instead, it relied exclusively on a law review article claiming that in scholarship programs generally, a purportedly low scholarship amount can discourage participation by non-religious schools. *See Simmons-Harris*, 234 F.3d at 959 (State Pet. App. at 25a-26a) (citing Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999)).

This novel theory was neither advanced by respondents nor adopted by the district court, and for good reason. At the outset, the record is barren of any support for

the suggestion that the Program scholarship amounts are tied to the tuition of religiously affiliated schools, or that only parochial schools receive funding from sources other than tuition. In fact, the scholarship amount is actually *higher* than the tuition costs of most participating schools. *See* Affidavit of Carolyn Jurkowitz ("Jurkowitz Aff.") at ¶2 (Hanna Perkins Pet. App. at 145a) (most scholarship schools do not receive the full $2,250 per pupil, because the scholarship amount is limited to 90 percent of tuition). Moreover, non-religious schools receive significant financial support from non-tuition sources. *See* Affidavit of Thomas Barrett at ¶5 (R. 34 at Exhibit 6, C.A. App. at 272) (superintendent of non-religious school explains that the full cost of educating one of its disabled children is between $13,000 and $14,000 per year—far more than the school's tuition or the scholarship amount).

More fundamentally, the Sixth Circuit's approach would lead the federal courts into a quagmire of litigation lacking clear constitutional standards, call into question a host of state and federal programs providing secular, voucher-type benefits, and ultimately would itself violate the Establishment Clause. The simple fact is that funding of the Program, like all state funding decisions in Ohio, rests ultimately with the Ohio legislature. Scholarship Program funding is therefore determined in exactly the same manner as funding for other programs—through the push and pull of democratic debate over priorities, against a backdrop in which worthy projects inevitably outstrip available monies.

If this Court were to uphold the Sixth Circuit's analysis, it would mean that funding levels for a wide array of state and federal programs would ultimately be subject to intrusive and standardless federal court review. This review would encompass not only elementary school scholarships, but scholarships for higher education, reimbursement

programs for medical expenses, and "vouchers" for social services under state and federal programs. *See, e.g.*, Veterans' Readjustment Benefits Act, 38 U.S.C. §3451 *et seq.*; Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. §604(h); Health Insurance for the Aged Act, 42 U.S.C. §1395 *et seq.*; Ohio Student Choice Grant Program, R.C. 3333.27. Each such program would be subject to scrutiny not only on grounds that a facially neutral funding formula had *over*-funded religiously affiliated service providers but also, on the Sixth Circuit's novel theory, that such formulas leave those providers *under*-funded.

Needless to say, such an approach "would scarcely provide the certainty that this field stands in need of," nor would there be any "principled standards" by which such budgetary allocation decisions "might be evaluated." *Mueller*, 463 U.S. at 401. One result would be judicial intrusion into state and local educational affairs of the precise sort that this Court long ago renounced. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44-55 (1973); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *see also Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 270, 289-291 (1990) (Stevens, J., dissenting). A second and equally troubling result would be a judicial command for government to engage in the precise sort of covert "religious gerrymandering" that the Establishment Clause had been thought to forbid. *Kiryas Joel*, 512 U.S. at 729 (Kennedy, J., concurring).

C. The Sixth Circuit Misread This Court's Decision in *Nyquist*.

Given these alternative rationales, it is not surprising that the majority below ultimately came to rely almost exclusively on *Nyquist*. *See Simmons-Harris*, 234 F.3d at

958 (Pet. App. at 24a-25a). But *Nyquist* should in no way control, by virtue of the important differences between the New York State program at issue there and the Cleveland program at issue in this case.

Nyquist involved a New York program that attempted to rescue religious schools from "increasingly grave fiscal problems." *Nyquist*, 413 U.S. at 756. To accomplish this goal, the New York legislature enacted a statewide, three-tiered structure of aid: direct *per capita* grants to non-public schools for "maintenance and repair;" tuition reimbursements to parents of non-public school children of $50 (students in the first eight grades) or $100 (high school students); and tax relief at similar levels for parents whose annual income was too high to qualify them for reimbursements, but still below $25,000. Significantly, despite this state aid, the *Nyquist* schools remained free to "impose religious restrictions on admissions" and to "require obedience by students to the doctrines and dogmas of a particular faith." *Id.* at 767.

In light of these features, the *Nyquist* Court emphasized legislative findings acknowledging the genesis of New York's program as a response to what the legislature itself termed a "fiscal crisis in *non-public* education." *Id.* at 763 (emphasis added). Far from being strictly neutral toward religion, the Court found aspects of the program "a recent innovation, occasioned by the growing financial plight of such nonpublic institutions." *Id.* at 792.

Despite these statements, the panel majority below never came to grips with the fact that *Nyquist*'s tuition reimbursements were invalidated precisely because of concerns about opening doors to use of covert means "to support or to subsidize" religion. *Id.* at 793. *Nyquist* itself was quite clear in this respect: "[I]t is precisely the function of New York's law to provide assistance to private schools,

the great majority of which are sectarian." *Id.* at 783. With such a sharpened objective, the *Nyquist* program could not have missed its intended target of locking in an educational status quo. *Nyquist*'s holding is therefore limited to circumstances where students already attending religious schools are given purposeful inducements to encourage them to stay in those schools, albeit in order to promote ostensibly secular purposes like preserving educational diversity, enabling free exercise of religion, and forestalling overcrowding of public schools. *Id.* at 764-65.

Indicative of its overreading of *Nyquist*, the Sixth Circuit majority did not even mention, much less consider, the dispositive distinction that *Nyquist*'s program was intended to "provide assistance to private *schools*," *id.* at 783 (emphasis added), while Ohio's is intended to provide assistance to public- and private-school *students*. The panel majority thus overlooked entirely several aspects of Ohio's program that pointed to this fundamental difference.

For example, as indicated earlier, Ohio provides tutorial scholarships available to students attending the Cleveland public schools. R.C. 3313.978(B). This portion of the Program makes available the same number of tutoring grants by grade as scholarships, and, significantly, provides that these two facets of the Program draw funding from the same sources. *Id.* Likewise, Ohio's carefully-fashioned plan, unlike *Nyquist*'s, requires that at least half of all scholarships must be awarded to students who did *not* attend private school prior to receipt of their initial Program scholarship. R.C. 3313.975(B). Far from locking in a private-school status quo, this feature ensures that Ohio's program has its intended effect of expanding educational opportunities for low-income students in a troubled school system. Finally, unlike *Nyquist* schools, schools participating in Ohio's program are prohibited from

discriminating on the basis of religion or requiring obedience to a particular faith. R.C. 3313.976(A)(4). This program element, absent entirely from New York's program, guards against any conceivable misperception of governmental indoctrination or endorsement of religion. Ohio's program, unlike *Nyquist*'s, is thus precisely what it purports to be—a comprehensive regime of choice for students in dire need. Nothing in *Nyquist* requires the invalidation of such programs.

D. Ohio's Program Fits Comfortably Within *Nyquist*'s Reservation Of Judgment On Generally Available Scholarship Programs.

The reliance on *Nyquist* below was particularly misplaced in light of *Nyquist*'s own reservation of judgment as to this very situation—that is, "a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38. This express reservation, assessed in light of the extensive post-*Nyquist* jurisprudence, also points to the Program's constitutionality.

At the outset, for reasons already described, the Program provides the sort of generally available scholarships on which *Nyquist* expressly withholds judgment. The Ohio Program extends as many tutorial assistance grants to public school students as it does scholarships to private school students; permits the voluntary participation in the Program by all public and private schools in or adjacent to the Cleveland City School District; applies not statewide but only to the geographic area and individual students most in need of better schools; and is open to *any* Ohio school district meeting certain neutral, inherently secular criteria of educational and management failure. The Ohio scholarships

are thus constitutionally indistinguishable from scholarships provided under the G.I. Bill—the paradigmatic example of the programs on which *Nyquist* reserves judgment. *Id.*

Because *Nyquist* by its own terms does not control, the Sixth Circuit erred in declining to take decisive guidance from this Court's post-*Nyquist* decisions. *See supra* at 22-24. It bears noting, for instance, that all nine Justices in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), emphasized the central roles of neutrality and private choice in a proper analysis under the Establishment Clause. *See id.* at 839 (majority opinion relying on "neutrality towards religion"); *id.* at 880, 886 (Souter, J., dissenting) (dissent relying on private citizens' ability to "break the circuit" through their "independent discretion to put State money to religious use"). This broad-based agreement (even amid other disagreements) spotlights not only the Sixth Circuit's mishandling of authority, but more importantly, the grave Establishment Clause issues raised by its neglect of private choice and neutrality in favor of an odd focus on percentages of religiously affiliated schools and students.

Notwithstanding *Mueller*, the Sixth Circuit decision appears to impose unprecedented requirements that, before dispensing benefits capable of use in "sectarian" settings, government must somehow ensure that not too great a share of those benefits will be directed through private choice to religiously affiliated providers. Even though it struck down the Cleveland program, the Sixth Circuit might well approve, for example, a scholarship component for an educational reform program in Columbus, because according to recent Ohio survey results, Columbus, in contrast to Cleveland, boasts roughly equal numbers (about 15 each) of Roman Catholic and non-religious elementary schools. Alternatively, the panel's opinion might be read to approve a

scholarship component for a city with Cleveland's religious demographics, but on condition that those benefits are restricted to use in non-religious settings.

Any such line-drawing produces significant tensions with post-*Nyquist* understandings of neutrality and entanglement. Specifically, any requirement that States survey religious demographics and tailor any private choice aspects of localized programs to ensure that no "too large" share of benefits ends up in "sectarian" hands would contradict the fundamental principle of "government impartiality, not animosity, toward religion." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring).

Likewise, a requirement that States legally restrict benefits to use only in non-religious settings would contradict not only the command of "impartiality, not animosity," but non-entanglement requirements as well. *See, e.g., Agostini*, 521 U.S. at 232-33 (incorporating entanglement analysis into the effects inquiry). For instance, the question whether Columbus has precisely equal numbers of Catholic and secular elementary schools may well turn on whether one categorizes the Westgate Friends Kindergarten as a purveyor of secular education, or as the inculcator of Quaker theology. For government even to attempt to answer that question tends intrusively toward constitutionally sensitive entanglements between religious and secular authorities.[3]

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[3] This is especially true in light of the extensive evidence of religious pluralism in the student bodies and on the faculties of even those Cleveland schools participating in the program and having the clearest religious identities. Jurkowitz Aff. at ¶4 (Hanna Perkins Pet. App. at 146a) (Sixty-two percent of the scholarship students enrolled in the registered Catholic

The Sixth Circuit's heavy *Nyquist* reliance was misplaced not only because *Nyquist*'s facts are distinguishable; and not only because *Nyquist* stops short of prejudging generally available scholarships; but also because, by misreading post-*Nyquist* authority, the Sixth Circuit heightened, rather than dispelled, Establishment Clause concerns. For these reasons, this Court need not address whether, in view of its unique facts, *Nyquist* remains good law.

E. *Nyquist* Should Not Be Applied To Invalidate The Ohio Program.

We are constrained to note, however, that *Nyquist* continues to spawn nationwide confusion. As in Wisconsin, officials in Ohio created their scholarship program with this Court's jurisprudence firmly in mind. The Ohio Supreme Court has approved the Ohio Program, just as the Wisconsin Supreme Court similarly upheld—notwithstanding *Nyquist*—a neutral, private choice program fashioned by Governor Tommy Thompson and Wisconsin's legislature. *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998). Along these same lines, Judge Ryan passionately argued in dissent that nothing in this Court's decisions demands the sweeping, rigid *Nyquist* interpretation embraced by the Sixth Circuit majority.

We believe, for the reasons stated, that *Nyquist*'s strictures are fully satisfied by the Ohio Program, all the more so in light of *Nyquist*'s own reservation of judgment in footnote 38. But if we are mistaken, and if state supreme

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schools are not of the Catholic faith); *see generally*, Brief of Petitioners Hanna Perkins School, *et al.*

court judges in both Ohio and Wisconsin are likewise in error, and if Judge Ryan is also wrong, then the problem lies with *Nyquist* itself. Because it continues to sow seeds of confusion, and since it stands in tension with the Court's more recent decisions on which state officers have relied and continue to rely, *Nyquist* should not be permitted to stand in the way of Ohio's program.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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